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NO. 82-913

In The

Supreme Court of the United States

OCTOBER TERM, 1982

LONG ISLAND UNIVERSITY,
Petitioner,

V.

DIANA SPIRT, et al.,
Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**MEMORANDUM FOR RESPONDENT
FOR DIANA SPIRT**

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QUESTIONS PRESENTED

1. Does Title VII of the Civil Rights Act of 1964, as construed by this Court in City of Los Angeles, Department of Water & Power v. Manhart, 435 U.S. 702 (1978), prohibit the use of the retirement benefit plans of respondents Teachers Insurance and Annuity Association ("TIAA") and College Retirement Equities Fund ("CREF") which:

(a) were found to be triangular arrangements among plaintiff, LIU and TIAA-CREF;

(b) require plaintiff's participation;

(c) are admitted to be a term and condition of employment and a fringe benefit of plaintiff's compensation;

(d) are jointly funded through

contributions to TIAA-CREF by and on behalf of males and females, which contributions are exactly equal for similarly situated participants;

(e) are administered by TIAA-CREF who make all payments of benefits; and

(f) solely as the result of using sex differentiated group mortality tables, pay a smaller periodic benefit to individual female retirees than to individual male retirees who retire at the same age and are otherwise similarly situated, including having identical accumulated contributions?

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MEMORANDUM FOR RESPONDENT
DIANA SPIRT

The plaintiff in this action, Diana
Spirt, respectfully submits that the
decision below is correct in adhering to

the decision of this Court in City of Los Angeles, Department of Water & Power v. Manhart, 435 U.S. 702 (1978). Plaintiff, however, urges for the reasons herein set forth that the Petition for Writ of Certiorari filed by defendant Long Island University ("LIU") should be granted and the decision below summarily affirmed.

Respondent Spirt heretofore authorized defendants TIAA and CREF to state in their motion, subsequently denied, to the Court for an expedited consideration accompanying their companion Petition for Writ of Certiorari in this action¹ that she had no objection to the granting of the Writ and to the request for argument

¹ TIAA-CREF filed a Petition for a Writ of Certiorari and their Motion for Expediting Consideration of the Petition on November 9, 1982 (No. 82-791).

to be scheduled on the same date as that in Norris v. Arizona Governing Committee, 671 F.2d 330 (9th Cir. 1982), petition for cert. granted, 52 U.S.L.W. 3276 (U.S., Oct. 12, 1982) (No. 82-52),² agreeing principally because of the decision in Peters v. Wayne State University, 476 F. Supp. 1343 (E.D. Mich. 1979), rev'd, Nos. 79-1658, 79-1670, 79-1671 (6th Cir., Oct. 14, 1982), petition for cert. filed 51 U.S.L.W. (U.S., Nov. 10, 1982) (No. 82-794) ("Peters"). The Peters case involves the TIAA-CREF plan, and the decision is in direct conflict with the lower court decision herein.

² The Motion further declared that plaintiff supports the result reached by the Second Circuit and reserves her position on the merits. Motion by Petitioners TIAA-CREF, p. 5. That motion was denied.

STATEMENT OF THE CASE

The statement of this case in the petition by LIU presents a succinct summary of the case, and only the following undisputed points are added:

1. The plan of TIAA-CREF-LIU ("Plan") with employees, including plaintiff, was found by the lower court to be a tripartite arrangement among TIAA-CREF, LIU and the employee-participants (JA1022)³ and is admitted to relate to compensation and to be part of the terms, conditions and privileges of plaintiff's employment; it was further admitted to be a fringe benefit to her within the express provisions of the collective bargaining agreement and

³ "JA" refers to the Joint Appendix filed in the Second Circuit Court of Appeals.

subject to negotiation with the duly certified collective bargaining unit, United Federation of College Teachers, AFL-CIO, of which plaintiff is a member (JA216-217). TIAA-CREF manages the Plan established at LIU by a detailed resolution of the Board of Trustees as the retirement plan of the university to be fully administered by TIAA-CREF, who also receive all funds and make all payments of benefits (JA188).

2. Actuarial principles are admittedly not offended by a gender neutral mortality table (JA185) ("Unisex Table"), and the failure to use such tables was the key question in Manhart. Whether such tables are to be used is the principal difference between the decision of the lower court in this case and the contrary decision by the

Sixth Circuit Court of Appeals in Peters, supra, permitting the use of sex segregated tables. The conflict presents the only issue appropriate for review and presents a conflict which this Court should resolve. All other issues herein are based on finding of fact (e.g., relationship among parties) or are within the sound discretion of the lower court (e.g., scope of relief) or do not present the special and important reasons for review on a writ of certiorari.

3. Respondent Commissioner of Insurance, State of New York ("Commissioner"), who has the supervisory and regulatory jurisdiction of insurance companies in the insurance and pension business in the State of New York, stated during the proceeding in the

lower court that plans using the Unisex, non-sex differentiated mortality tables do not violate the requirements of the statutes of the State of New York and requirements of equity (JA626), and he formally approved one proposal by TIAA-CREF to use Unisex Tables in connection with the plans at issue (JA452-453). Thus, the use of Unisex Tables comports with all insurance regulatory requirements of the State of New York, including equitable treatment of participants and risk classification.

4. Respondent TIAA-CREF proposed and obtained approval of one Unisex plan from the Commissioner (JA626) and adopted and obtained approval of a variation of that Unisex plan from the Equal Employment Opportunity Commission ("EEOC") (JA614). The use of Unisex

Tables finds no impediment from New York Insurance Law, actuarial principles, insurance concepts or, of course, the EEOC.

5. The TIAA-CREF-LIU Plan is subject to the requirements of the Employees Retirement Income Security Act of 1974, 29 U.S.C. §§1001, et seq.

SUMMARY OF ARGUMENT

Memoranda filed by petitioner LIU, by petitioners TIAA-CREF in their companion petition (supra, p. 2, fn. 1), and by intervenor-respondent American Association of University Professors ("AAUP") in this case and by the petitioner and respondent in Peters (supra, p. 3), plus the proceedings to date in this Court in Norris (supra, p. 3), urge a multitude of points orbiting

the question of whether segregated, sex discriminatory mortality tables may be used under the circumstances presented in each case.

Respondent Spirt agrees with petitioner LIU that the sole question appropriate for review by the Court in this action and in Peters is whether the Manhart principles are to be enforced; if so, respondent respectfully submits that those principles are applicable and are the basis for summary affirmance with the consequences which would follow in the Peters case.

ARGUMENT

But for the conflicting decision by the Sixth Circuit Court of Appeals in the Peters case, an appropriate case for granting of the writ is not presented. The Peters decision applied the group or class analysis approach to the use of sex segregated annuity tables. The approach has been repeatedly described by TIAA-CREF as providing "actuarially equality" between the classes of males and females,⁴ that is, by actuarial accounting, the total pay-out of benefits for each group over several decades and after the last of each group is deceased, will be equal when the total paid-in for each group was equal.

⁴ See, Petition for Writ of Certiorari of TIAA-CREF in this action, fn. 1, supra, p. 2 at p. 5. In spite of the Manhart ruling, TIAA-CREF still urge this argument.

Manhart rejected the "actuarial equality" approach urged by TIAA-CREF. In doing so, this Court made the following rulings or findings relating to the question presented:

1. Although women as a class may outlive men as a class, "[i]t is equally true. . . that all individuals in the respective classes do not share the characteristic [life expectancy] that differentiates the average class representatives." Manhart, 435 U.S. at 709.

2. "The question. . . is whether the existence or non-existence of 'discrimination' is to be determined by comparison of class characteristics or individual characteristics." Id.

3. In answering the question, the Court noted that Title VII's "focus

on the individual is unambiguous" and that even true generalizations about a class are an insufficient reason to discriminate against an individual.

Id.

4. Women as a class, to some extent, may be subsidized by men as a class. But, "the question of fairness to various classes affected by the statute [Title VII] is essentially a matter of policy for" Congress which "has decided that classifications based on sex, like those based on national origin or race, are unlawful." Id., at 710.

5. As to the insurance equity and risk points emphasized by TIAA-CREF in Manhart⁵ and again here, the Court noted

⁵ TIAA-CREF appeared as amici curiae in Manhart.

that "when insurance risks are grouped, the better risks always subsidize the poorer risks." The treatment of "different classes or risks as though they were the same is a common practice which has never been considered inherently unfair." To insure the flabby and fit as equivalent risks may be more common than treating males and females alike but "nothing more than 'habit' makes one 'subsidy' seem less unfair than the other." Id., at 711.

6. "Even if the statutory language [of Title VII] were less clear, the basic policy of the statute requires that we focus on the fairness to the individual rather than fairness to classes." Id., at 710.

7. Classifications by religion, race or sex tend improperly to preserve

traditional, or stereotyped, assumptions about groups rather than thoughtful scrutiny of individuals, and the Court expressly commented that generalizations of the separate mortality tables illustrate the point. Id.

8. No special definition of discrimination is used for groups, or classifications, for insurance groupings. No one can predict an individual's life span but this point is no different from other individually unpredictable events in many employment or management decisions. Id., at 711.

9. "Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII". Id., at 711.

10. The practice of the separate tables does not pass even the simplest

test, and it is sex discrimination. One cannot say that the differentiation is not based entirely on sex. " 'Sex is exactly what it [the discrimination] is based on' . . .", quoting Judge Dunaway from the Court of Appeals opinion. Id., at 713-714. The argument that the different treatment of males and females was based on longevity rather than sex was stated to be specious. Id., fn. 24 at 714.

What this Court found in Manhart to be a specious argument was nonetheless applied in Peters, and each of the foregoing points was ignored.

Since the application of Manhart is the only issue as to which a Writ of Certiorari is appropriate, the most expeditious way to dispose of the conflict between this action and the Peters action

is to grant the petition of LIU and,
assuming Manhart is held by this Court to
govern, summarily to affirm the decision
of the Second Circuit Court of Appeals.

CONCLUSION

Respondent-plaintiff Spirt
respectfully suggests that the Writ of
Certiorari in this action be granted,
that the question accepted is that stated
herein and that upon granting such Writ
that the decision of the lower court be
affirmed.

Dated: December 27, 1982

Respectfully submitted,

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(Counsel of Record)
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